UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAWRENCE J. AUGUSTINE, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	DOCKET NUMBER DA04329110168 DATE: OCT 29 1991

Robert J. Marren, El Paso, Texas, for the appellant.

Thomas R. Murphy, Esquire, El Paso, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the case to the regional office for further adjudication, consistent with the terms of this Opinion and Order.

BACKGROUND

On September 11, 1989, the agency notified the appellant that it proposed to remove him from his GS-12 position of Criminal Investigator based on unacceptable performance in a single critical element. *See* Agency File, Tab 4G. On October 27, 1989, the agency issued to the appellant a decision letter stating that his removal would be effective on November 3, 1989. *Id.* at Tab 4F. In that letter, the agency advised the appellant that he could contest the removal action, either by appealing to the Board or by pursuing a grievance through arbitration, but not both. *Id.* The appellant elected the latter route. *Id. at* Tab 4B. On July 16, 1990, following a hearing, an arbitrator issued a decision denying the grievance. *See* Agency File, Tab 4A.

Thereafter, on July 31, 1990, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging that his removal was in reprisal for his whistleblowing activities.[1] *See* Appeal File, Tab 1A. The appellant had not raised this allegation before the arbitrator. On December 5, 1990, the appellant filed an appeal with the Board's Dallas Regional Office alleging harmful procedural error, reprisal for whistleblowing, and age discrimination. On December 10, 1990, by letter dated December 3, the appellant was notified by OSC that it was terminating its investigation into his complaint. *Id.* at Tab 5A.

[1] The contents of the actual complaint have not been made a part of the record.

In his initial decision dismissing the appeal for lack of jurisdiction, the administrative judge first found that jurisdiction as to the appellant's removal did not lie under the Whistleblower Protection Act (WPA), as he had alleged, because of the WPA's savings provisions. *See* Initial Decision (I.D.) at 5-6. The administrative judge next found that, even if the WPA were applicable to this case, the appeal was untimely filed. *Id.* at 8-10. Finally, the administrative judge found that the appellant's election of the grievance procedure divested the Board of jurisdiction under 5 U.S.C. § 7121(e). *Id.* at 6-8.

ALLEGATIONS ON PETITION FOR REVIEW

In his petition for review, the appellant disagrees with the administrative judge's findings as to jurisdiction and timeliness. The appellant first argues that the agency's removal action was not "pending" as of the effective date of the WPA, and that, therefore, jurisdiction does lie under the Whistleblower Protection Act. *See* Petition for Review at 4-6. The appellant further argues that his appeal was timely filed under the WPA. *Id.* at 6-9. Finally, the appellant contends that his election of the grievance procedure did not divest the Board of jurisdiction. *Id.* at 6.

ANALYSIS

The appeal is not excluded from the coverage of the WPA because of the Act's savings provision.

The administrative judge determined that the WPA was inapplicable in this case and did not provide a basis for Board jurisdiction because: (1) Under the WPA's savings provision, the Act does not affect any administrative proceeding pending as of July 9, 1989, the effective date of the Act; (2) by May 9, 1989, the appellant had failed his performance improvement period and been issued an unacceptable rating, and his supervisor had initiated steps, through appropriate channels, to have a proposal notice issued to the appellant based on unacceptable performance; (3) removal was, therefore, "threatened" before July 9, 1989; and (4) accordingly, sufficient agency action was in progress and had, in fact, been completed before that date to conclude that this was an administrative proceeding pending prior to the WPA.

We disagree. The savings provision of the WPA states, in relevant part:

> No provision of this Act shall affect any administrative proceeding pending at the time such provisions take effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom, as if this Act had not been enacted.

Pub.L. No. 101-12, § 7(b), 103 Stat. 16, 34 (1989). The Board has issued regulations interpreting the savings provision of

the WPA. 5 C.F.R. § 1201.191(b). With regard to administrative proceedings and appeals, the Board's regulation states:

> "Pending" is considered to encompass existing agency proceedings, including personnel actions that were proposed, threatened, or taken before July 9, 1989, the effective date of the Whistleblower Protection Act of 1989, and appeals before the Board or its predecessor agencies that were subject to judicial review on that date. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

Id.

The Board has found, consistent with its regulations and its interpretation of previous savings provisions, including those of the Civil Service Reform Act and the Act which conferred appeal rights on certain supervisory and managerial employees of the U.S. Postal Service[2], that an action is "pending" as of the date an employee receives notice of the proposed agency action. *See Marshall v. Department of Veterans Affairs*, 44 M.S.P.R. 28, 32 (1990). The Board has further found that the notice of proposal is the key date, for purposes of invoking jurisdiction under the WPA, notwithstanding that the proposal notice may be based on evidence obtained prior to issuance of the notice, because it is the date on which the proposal to take action is received that marks the beginning of the agency proceeding. *See Gergick v. General Services Administration*, MSPB Docket No. SL122190W0030, slip op. at 9 n.9 (July 25, 1991). *See also*

[2] *See* Pub.L. No. 100-90, § (b)(2), 101 Stat. 673 (1987).

Allard v. Department of Health & Human Services, MSPB Docket Nos. SE122190S0276, SE07528GS0181, slip op. at 7 (June 4, 1990) (finding that nonselections for promotion occurring after July 9, 1989, are subject to the WPA although the selections may have been pending prior to that time). We conclude, therefore, that, because the appellant received the proposal notice in this case on September 12, 1989, see Appeal File, Tab 1, Subtab T, the action appealed[3] was not "pending" on July 9, 1989, the effective date of the WPA, and jurisdiction under that statute is not precluded.

The appeal was filed within the applicable time limits.

The administrative judge further found that, even if the WPA was applicable, the appellant's appeal was not timely filed. He reasoned that, because the appellant was affected by an otherwise appealable action (his removal) that must be appealed to the Board within 20 days of its effective date under 5 C.F.R. § 1201.22, he was required to choose within

[3] We reject the agency's argument that the appellant's removal was "threatened" before July 9, 1989, based on his having failed his performance improvement plan and having received an unacceptable rating, since he appealed the removal action, not an allegedly threatened personnel action. *See Gergick v. General Services Administration*, MSPB Docket No. SL122190W0030, slip op. at 8 n.8 (July 25, 1991). Any other reading of 5 C.F.R. § 1201.191(b) would render meaningless its last sentence in any case where, prior to the effective date of the Act, an agency indicated the possibility that disciplinary action could later be taken, and it is the ultimately effected action that is appealed. Such an interpretation of the regulation is to be avoided. *See Papa v. U.S. Postal Service*, 31 M.S.P.R. 512, 516 (1986) (each part of a regulation must be construed in conjunction with the other parts of the regulation as a whole).

that appealable time limit whether to appeal directly to the Board or first go through OSC.

The statute and implementing regulations do not support the administrative judge's position. Under 5 U.S.C. § 1214(a)(3), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken, because of the appellant's whistleblowing activities. *See* 5 C.F.R. § 1209.2(a). The Board exercises jurisdiction over Individual Right of Action (IRA) appeals, where the appellant must seek corrective action from OSC before appealing to the Board, and otherwise appealable action appeals. *Id.* at § 1209.2(b)(1) and (2). As to otherwise appealable action appeals, the Board's regulations state that the appellant may choose either to seek corrective action from OSC before appealing to the Board or to appeal directly to the Board. *Id.* at § 1209.2(b)(2).

The appellant in this case chose to seek corrective action from OSC before appealing to the Board. The statute places no time limit on an employee's right to seek such corrective action from OSC. *See* 5 U.S.C. § 1214(a)(1)(A). *See also* 5 C.F.R. Part 1800, OSC's regulations imposing no time limit for the filing of complaints. Thus, although the appellant did not, in fact, seek corrective action from OSC

until after he had unsuccessfully grieved his removal, his complaint to OSC was timely.[4]

Having chosen to seek corrective action from OSC before appealing to the Board, the appellant's time limit for appealing to the Board is governed by 5 C.F.R. § 1209.5(a). *See* 5 C.F.R. § 1209.5(b). Those time limits provide only that, if OSC has not notified the appellant that it will seek corrective action on his behalf within 120 days of the date of filing of the request for corrective action, then his appeal may be filed at any time after the expiration of 120 days. *Id.* at § 1209.5(a)(2); 5 U.S.C. § 1214(a)(3). The legislative history of the WPA supports our position that no other time limit is applicable. In the Report of the Committee on Governmental Affairs of the U.S. Senate, S. Rep. No. 413, 100th Cong., 2d Sess. 18 (1988), the Committee indicated that it did not intend that any time limit be applied to appeals by whistleblowers whose cases have not been formally closed by OSC. Since the appellant filed his appeal with the Board after 120 days had passed without OSC's having notified him that it would seek corrective action on his behalf, his appeal was timely filed.[5] *Cf. Horton v. Department of the Navy*, 47 M.S.P.R. 475, 478-80 (1991) (the statutory language of the

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[4] The record reflects that OSC accepted and investigated the appellant's complaint. It gave no indication that it believed the complaint to be untimely. *See* Appeal File, Tab 9.

[5] At the time the appellant filed his appeal with the Board, he was apparently unaware that OSC had issued its letter of closure. *See* Appeal File, Tab 5A.

WPA indicates by its own terms that IRA appeal rights are independent of the EEO complaint process and vest upon the expiration of the time limits set forth at 5 U.S.C. § 1214(a)(3), which are the only exhaustion requirements that Congress intended to be imposed on such actions).

Board jurisdiction is not precluded by 5 U.S.C. § 7121(e).

The administrative judge also found that the appellant's election to grieve his removal under the collective bargaining agreement divested the Board of jurisdiction under 5 U.S.C. § 7121(e). That section provides, in pertinent part, that:

> Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both .... An employee shall be deemed to have exercised his option under this subsection ... at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

The appellant, in this case, made a valid election to grieve his removal and he could not, under the above-quoted statute, also have filed an appeal with the Board directly from the agency's action. Nothing in the WPA, however, suggests that an employee who makes such an election is thereafter precluded from filing an appeal with the Board on a

whistleblowing claim, provided that he first goes to OSC, and that he meets the statutory and regulatory time limits.

The appellant originally had the right to appeal his removal directly to the Board based on, inter alia, 5 U.S.C. § 1221(b).[6] Even though he elected to grieve, the appellant still had the right to appeal to the Board under 5 U.S.C. § 1221(a), which allows an employee, former employee, or applicant, subject to the provisions of 5 U.S.C. § 1214(a)(3), to seek corrective action from the Board with respect to any personnel action taken or proposed to be taken against him as a result of prohibited whistleblowing. As we have found above, the appellant's appeal to the Board met the requirements of 5 U.S.C. § 1214(a)(3) because it was filed after 120 days had passed without OSC's having notified him that it would seek corrective action on his behalf. *See also* 5 C.F.R. § 1209.2(b)(1). Thus, the Board has jurisdiction over this appeal, and that jurisdiction is unaffected by the appellant's earlier election to grieve.[7]

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[6] That subsection states that 5 U.S.C. § 1221, the section that deals with IRA appeals, may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Board before seeking corrective action from OSC, if the employee, former employee, or applicant has the right to appeal directly to the Board under any law, rule, or regulation.

[7] Moreover, we note that any ruling prohibiting an appellant who has elected to first pursue the grievance route from thereafter filing an appeal with the Board under the WPA would interfere with the statutory scheme allowing stay requests to OSC and the Board, and could arguably prevent the expeditious granting of a stay. *See* 5 U.S.C. § 1221; *Horton*, 47 M.S.P.R. at 479.

Thus, we conclude that the appellant's election to grieve his removal under 5 U.S.C. § 7121(e) did not divest the Board of jurisdiction under the WPA, and that the case must be remanded for adjudication on the merits of the appellant's whistleblowing claim. *Cf. Jones v. Department of the Navy*, 898 F.2d 133, 135-36 (Fed. Cir. 1990) (that employee removed by agency first proceeded through negotiated procedure to arbitration prior to filing Board appeal did not deprive Board of jurisdiction where employee first alleged handicap discrimination before the Board).

Accordingly, we remand this appeal for adjudication of the appellant's whistleblowing claim.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.